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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 16

THE SHOTWELL MANUFACTURING COMPANY (Renamed Homan Mfg. Co., Inc.), A CORPORATION, BYRON A. CAIN AND HAROLD E. SULLIVAN,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS FOR CERTIORARI AND MOTION TO REVERSE UPON PETITION AND BRIEF IN OPPOSITION BECAUSE OF ILLEGAL JURY SELECTION PROCEDURES.

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MAY IT PLEASE THE COURT:

This Court remanded this case for one purpose—to secure a clear finding as to the "integrity of the record" as to the suppression issue—had petitioners actually gone to the Government at a timely date or was their claim they had gross fiction?

The Brief in Opposition avoids that issue. By reference to the District Court's extraneous findings in 1959 as to what he believed the black market facts to have been (jury questions), it endeavors to conceal the collapse of the Government's case on the remanded issue.

To re-focus on salient points: the Government contended when the case was in this Court in 1956-57 that the original evidence that Petitioners voluntarily went to the Treasury before investigation of Shotwell's taxes had been initiated and because of the Treasury's promises of immunity, was utter perjury; that it was not until after Revenue Agent Krane had been at the plant on June 21, 1948 that petitioners went to the Treasury *at all*. Judge Nordbye, on the new hearing, squarely found against the Government (Pet. 44).

In the original case auditor Busby testified he learned of the black market transactions from Graflund on a trip to New York in January 1948; that this prompted him to advise the disclosure and formed its genesis. This was charged to be rank perjury. It was asserted Busby knew nothing of these affairs until *after* June 21, 1948. But Judge Nordbye found Busby did so learn of the black market deals when he and Graflund "were on the train together in January, 1948" (Pet. 43). Busby and Cain had testified that they were told by Revenue Agent Sauber to supply information in order to avoid prosecution. On remand Judge Nordbye found such testimony "entirely probable" (Pet. 45). Originally it had been testified that preparatory work of assembling of records from which to reconstruct the Lubben account had taken place at sundry times during the spring of 1948; the Government promised this Court (Br. for U. S. #1 O. T. 1957, p. 27) it would prove no such work was done prior to June 21, 1948. On remand Judge Nordbye found such work was done during the spring of 1948 (Pet. 45).

Now, despite its prior lurid claims, the Department of Justice concedes the following were the facts as to how the documents we assert should be suppressed were procured:

> "A public offer [of immunity] was made to all taxpayers; and petitioners, who had not even been ac-

cised, voluntarily came forward and admitted unreported receipts"; further, that petitioners "wished to avail themselves of the offer of immunity" (p. 13).

1.

The constitutional question as to whether the Government may use against citizens in a criminal trial incriminating material they have been induced by promises of immunity to prepare and surrender, is distinct from the question as to whether petitioners complied with the voluntary disclosure policy to such an extent that they were entitled to immunity from prosecution.

To argue that petitioners "had no basis for claiming the benefits (immunity) of that [voluntary disclosure] policy" (Br. in Opp. 11) does not meet the constitutional question of whether the Government, assuming it is free to prosecute, may use evidence it obtained by promising immunity.

The first Court of Appeals opinion found the constitutional question inhered in the case (225 F. 2d 394). The minority opinion here recognized the constitutional question as "important, unsettled and not susceptible to offhand resolution" (355 U. S. at 247). The majority held it was not open for decision until it was determined whether the entire claim that petitioners had voluntarily gone to the

1. Contrast these determinative admissions with what was told this Court in 1957:

"This [so-called new] evidence indicates, *inter alia*, that no move was made by respondents to disclose the corporation's unreported black market receipts prior to Special Agent Krane's visit to the corporation's plant on June 21, 1948." (Br. for U. S. in 1, O. T. 1957, p. 25.)

"The new evidence indicates that the testimony which placed the date of the so-called disclosure in January or March 1948 was perjurious testimony of respondents and of Busby and Sauber. *In fact, the so-called disclosure took place in July 1948.* This was subsequent to the occasion (on June 21, 1948) when Special Agent Krane called at the corporation office . . ." (Br. for U. S. in 1 O. T. 1957, p. 33.)

Government and produced papers before the Treasury commenced investigation was rank perjury and a fraud on the courts.

The "important, unsettled" constitutional question which should not be resolved "offhand" thus exists: the promise of immunity *was* made; petitioners *did* voluntarily come forward; petitioners *did* make incriminating statements under the *inducement* of the promise.

Those facts meet the rule of *Bram* v. *U. S.*, (168 U. S. 532, 542-3) that a confession is not admissible if "obtained by any direct or implied promises, however slight . . . for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration *if any degree of influence has been exerted.*" As the dissenting opinion when this case was first here shows, it has generally been assumed that the Fifth Amendment bars the use of admissions secured by promises of immunity (355 U. S. at 248) and that principle has been followed repeatedly or recognized in federal income tax cases. (See cases at Pet. 21-22.)

Nor does the fact that part of the confession may have been false as to part of the outgo, or may have overstated the amount of gross income (See Pet. 13, 21), prevent suppression on constitutional grounds because this Court ruled in *Rogers* v. *Richmond*, 365 U. S. 534, 544, that the constitutional question of admissibility is "to be answered with complete disregard of whether or not petitioner in fact spoke the truth." And if probably true confessional material induced by promises of immunity must be suppressed on constitutional grounds, *a fortiori* such material so procured must be suppressed when admittedly it is partially false. The inherent unreliability of evidence so procured is the classic common law cause for suppressing it.

The Brief in Opposition asserts no Fifth Amendment

question is presented because the declarants in *Bisno* and *Beacon v. Richmond*, were under detention, while petitioners "had not even been accused." The attempted distinction seeks to limit a broad legal principle to a single set of facts, an impermissible stratagem. Moreover, it amounts to a plain denial of the language of the Fifth Amendment, which does not read that "*no prisoner*" shall be compelled to be a witness against himself, etc. It says "*no person*" shall be subject to the things it mentions.[2]

The contention of the Brief in Opposition would strip all constitutional protection from the voluntary disclosure doctrine, for, if a taxpayer came in *before* he was accused, he would not be under detention and, according to the Brief in Opposition, would not fit the fact pattern of *Bisno v. U. S.*, while if he came in *after* he was accused, he was never promised immunity. This is in marked distinction to all previous utterances of the Treasury. The Treasury abandoned the voluntary disclosure policy precisely because it felt that even where there had been imperfect disclosures, the promise of immunity which had been extended entitled taxpayers to insist that documents obtained thereunder not be used against them in criminal trials (Treasury Statement, R. 3107, *et seq.*).

If the well settled principles referred to above are, contrary to our view, to be overruled or limited, that should be only after briefs, argument and hearing and upon an opinion that defines the law. The present trilogy of *Shotwell* decisions, two by the Court of Appeals, one by this Court, leaves the law as to what may be obtained by promises of immunity in a highly confused state. It should be settled.

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2 Having been unable to establish its claim that petitioners did not surrender their papers by reason of the promised immunity, the present Government brief writers rather obliquely assert that after the documents were surrendered there was an attempt to corrupt some one in Internal Revenue. The Brief in Opposition (p. 9,

2.

The Brief in Opposition flatly refuses to meet the second question presented by the Petition (p. 6), namely, asserts there was evidence at the supplemental hearing of "attempts to 'fix' the tax case * * * attempts which *necessarily* involved the corruption of Internal Revenue personnel." That statement is grossly unfair and unwarranted.

Counsel do not claim they proved this or that Judge Nordbye found it. Their language is a subtle variation by a clever brief writer of a phrase in Justice Harlan's recital in 355 U. S. at 240, that the evidence promised by the Government in 1957, *if true*, would indicate a conspiracy "*possibly* involving the corruption of Government officials." Justice Harlan noted the representation that Agent Lima would testify he prepared a report showing a tax deficiency of $20,000.

However, on the actual hearing Lima admitted that in February 1957 (after he had been put through a lie detector test and repeatedly had been interrogated and "refreshed"), he testified he had *no* knowledge of *any* "fix", or of Sauber, or Johnson, or himself getting any money; that he had "*heard nothing by hearsay or any other way of any fix in the case or anybody getting any money.*" (App. 1513.)

Huebner did testify he gave $10,000 to Cain in two $5,000 payments to "take care of" the tax case, but gave no objective or corroborative details which could be checked as to where he got the supposed sum or how he transmitted it. (App. 684.) Cain categorically denied this. (App. 1607.) AND THERE THE PROOF STOPPED.

Judge Nordbye recited the substance of Huebner's testimony and found, "* * * the Court cannot make a definitive finding as to whether or not any officials of the Government were actually bribed," and continued with the following equivocal statement, "However, I am convinced that this episode regarding the 'fixing' of tax officials by Cain occurred *as related* by Huebner." (Pet. 51.)

All Huebner "*related*" (we say falsely) was that he gave $10,000 to Cain "to take care of" the tax case. Government proof showed that neither Sauber, Johnson nor Lima got any money, and wholly failed to indicate that anyone else did. What was there for petitioners to negative and as to whom? And what possible burden rested on petitioners to prove affirmatively they had not been guilty of crime?

Having been given an unparalleled opportunity to prove their malign charge, and having failed, the prosecutors should not continue to assassinate by allegation. Petitioners are entitled to have their Petition considered in an atmosphere unpolluted by overtones of "corruption." (Emphasis throughout ours.)

whether the processes of this Court were abused by inducing it to hold the cases while witnesses were repeatedly interrogated and thereafter by suppressing important, sworn evidence contrary to the Treasury's "suspicion" that no disclosure had taken place, which would have made impossible the writing of the opinion in 355 U. S. in the form in which it was cast. The Department does not deny, but would have this Court ignore the documented facts set forth at pages 13-17 and 25-28 of the Petition.

There is no question of fact to be resolved: It is undisputed that Treasury functionaries, in the spring of 1955, formed a "strong suspicion" that the alleged disclosure "might not have taken place in March, 1948," which suspicion became "firmly fixed" by the middle of 1955 (Affidavit of Lester Stein, Special Assistant to Chief Counsel, Internal Revenue Service, attached to original and amended Motions to Remand and quoted at App. 197-199). Thereafter every scrap of evidence inconsistent with the "firmly fixed suspicion," even though solemnly sworn to by witnesses friendly to the Treasury before a Special Grand Jury, was ruthlessly suppressed.[3] Ultimately the witnesses' stories came into accord with the "firmly fixed suspicion." As Agent Lima put it on the final (February 20, 1957) of his several appearances before the Special Grand Jury:

> "* * * When I testified the first time I thought I knew just a little about this case and, by golly, with all these *conferences* and *interviews and refresher*

3. Note that the prosecutors in 1955-7 were not dealing with hostile suspects but with friendly witnesses. Graflund had had no connection with Shotwell since 1952, had co-operated with the Government and testified for it in 1953 (R. 1739), began co-operating with it again on November 8, 1955 and felt "grateful" to the Treasury because he had not been included in the original indictment (App. 1110-1111). Lima at all times was a Treasury agent and co-operative. Huebner began "co-operating" with the Government in the early summer of 1956 and long before the Motion to Remand was filed.

courses, it is amazing how much I know about it today." (App. 1382.)

The final versions of the witnesses, resulting from months of "refresher courses" and "glaringly inconsistent and contradictory" (Judge Nordbye, Pet. 52), to the suppressed, spontaneous original sworn versions, were the only ones put to this Court. Those versions made a "convincing showing" (355 U. S. at 242). Had the suppressed, contradictory versions been displayed, there would have been no "convincing showing." But the suppressed, contradictory versions are the ones which the District Court, on the determinative, remanded points, found to be true even though, for other (and we believe improper) reasons he held the disclosure was "fraudulent."[4]

We have referred in the Petition (pp. 26-28) to the clear duty resting on a prosecutor. The following quotation from a case in which it was held that a trial prosecutor,

4. The precision and clarity found in this Court's opinion is missing in the District Court's discursive opinion, entire paragraphs of which are devoted to asserted facts of the tax case. Although the Brief in Opposition at page 16 quotes a claim by the prosecutor that he proposed to introduce only evidence controverting the motion to suppress, page 18 of the Brief relies on a statement of the District Court that the supplementary hearing produced much evidence as to what believed use was made of the money that was paid to Shotwell. As we complain at page 9 of the Petition, the new hearing roamed the entire field. The District Court permitted himself to buttress his opinion with findings, speculations and unfounded criticisms of petitioners (all answerable) with respect to matters that were only for a proper jury trial. In the unprecedented posture in which the case was sent back, petitioners, as a minimum of due process, were entitled to clear, specific and precise findings of fact limited to the precise charges leveled against them here. Unable to prove what it had claimed to this Court, the prosecution induced the District Court to comment on the case generally. Yet the majority had said the case was not remanded to permit the Government "to 'bolster' the evidence upon which the verdict of guilty was returned by the jury" (355 U. S. at 244) and the minority noted that to do so would violate both the prohibition against double peopardy and would deny the right of jury trial on such issues (355 U. S. at 250-251).

should have disclosed to the defendant that a prosecution witness had given contrary grand jury testimony, condenses the relevant rules:

> "The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the government disclose the truth so that justice may be done than that some advantage might accrue to the prosecution toward ensuring a conviction. *Berger* v. *United States*, 1935, 295 U. S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314.
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> "* * * Our standards of fair play in federal criminal proceedings require that the government should present its evidence in its true colors and that it should never be a party to withholding any evidence which materially bears on the credibility of a witness it places on the stand. * * *" (*U. S.* v. *Zborowski*, 2 Cir., 271 F. 2d 661, 668.)

See 60 Col. L. Rev. 858, "The Duty of the Prosecutor to Disclose Exculpatory Evidence"; *People* v. *Savvides*, 1 N. Y. 2d 554, 136 N. E. 2d 853, cited with approval in *Napue* v. *Ill.*, 360 U. S. 264; *Curran* v. *Delaware*, 3 Cir., 259 F. 2d 707, 713; *U. S.* v. *Consolidated Laundries Corp.*, 2 Cir., May 31, 1961, *1961 Trade Cases*, Par. 70,039. Is a prosecutor under a lower duty in the Supreme Court than in the Trial Court? Obviously not. Obviously the higher a case goes in the judicial hierarchy the greater the reliance the court should be able to place in its officers.

The Brief in Opposition seeks to avoid this sordid matter by restating question No. 2 so as to claim we are asking the Court to re-evaluate the testimony of the hearing witness. No. The undenied fact is that the prosecution suppressed relevant exculpatory evidence. The question is whether civilized standards permit that a remandment order may be obtained by such means. That question is

not answered by referring to Judge Nordbye's statement, correct or incorrect, that he did not believe any Government official had attempted to have any witness testify falsely or that Graflund was attempting to tell the truth as he remembered it, etc.

Independently of the question as to the propriety of suppression of evidence by prosecuting officials, this case remains as the first case in which a partial remand was used at the behest of the prosecution in an effort to validate a conviction in a criminal case. The partial remand device was used to protect accused persons' rights in *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, and *Mesarosh* v. *U. S.*, 352 U. S. 1, and has since either been ordered or discussed as a judicial tool in *Lawn* v. *U. S.*, 355 U. S. 339, 366 (Dissent); *Giordenello* v. *U. S.*, 357 U. S. 480, 488; *Sangamon Valley Television Corp.* v. *U. S.*, 358 U. S. 49; *Wird Television Corp.* v. *U. S.*, 358 U. S. 51.

The Court may wish to re-evaluate the desirability of this procedure in the light of evidence now available to it: (1) that delay was consistently sought in this Court while the prosecutors conducted "refresher courses" with their witnesses;[5] (2) that by the time the Motion for Remand

5. Observe that by June 1, 1956 when the second letter was written to this Court requesting delay (see note 6 of this Court's opinion), Graflund already had given the prosecutors two lengthy statements (App. 985-986), both of which were fully corroborative of the original disclosure testimony; Lima had given at least two statements (App. 982-983); Huebner and his new lawyer had been negotiating with the prosecutors for approximately 45 days (App. statements (App. 988, 1432-1433); Huebner and his new lawyer had been negotiating with the prosecutors for approximately 45 days (App. 711).

On June 1, 1956 the Treasury had been "reinvestigating" for more than a year; the special prosecutors had been at work for two months. *All* major pieces of evidence ultimately presented to this Court came into existence after this date. Thus, the keystone piece, Graflund's version that he had not told Busby of the facts in January 1948 from which it was argued that Busby could

was filed in both its original and amended forms (October and November 1956) all three of the Government's witnesses had testified under oath to facts exculpatory of petitioners and glaringly inconsistent with the Government's hearsay affidavit sworn to by prosecutor Russo, and that such testimony was suppressed.

When the case was presented here the Court could not have assumed that these intolerable abuses of elementary criminal procedure were being carried on. The fact that they were carried on may incline the Court to limit application of the Shotwell type of partial remand. This is an evaluation which only this Court is in position to make, because certainly both the District Court and the Court of Appeals would have the greatest reluctance to go into the risks of a procedure this Court had ordered.

3.

That petitioners were convicted by the 1953 jury on seriously false oral evidence and on "doctored" records is not denied although Government counsel now quibble as to the precise amount of the falsity.

Before the jury the Government claimed it proved Lubben paid Shotwell $453,772 in 1945 and 1946 (R. 183-184, 1840, 1848-1849, 2064-2066). Judge Nordbye's *finding of fact* on the new hearing is that the total amount, including $28,000 in the year 1944, was "between $300,000 and $400,000" (Pet. 42). This necessarily means that Lubben "exaggerated" to the jury to the extent of $131,772 ($453,772 ($350,000 + 28,000) = $131,772, which figure we rounded off to $132,000 at Pet. 10, 12, 29). The figure of $132,000 is

not have advised or made a disclosure until much later, did not come into existence until February 20, 1957 (App. 1125-1129, 1134-1204-1205); Lima's version of destroying a revenue agent's report not until December 19, 1956 (App. 1464-1465, 1474). All of these recanted prior versions were solemnly, repeatedly and voluntarily given prior to those dates.

not a "distortion" of Judge Nordbye's findings, nor taken out of context. It is the inevitable mathematical result of his findings.

The question is not whether our calculation that new evidence shows the gross could not have exceeded $234,000 is correct. The Brief in Opposition asserts that figure is wrong. We do not think so, but that is not the point. The vital point is that the new hearing *established to the District Court's satisfaction, and he so found before resentencing petitioners*, that Lubben's testimony to the jury had not been "*true*" and "*sincere*" as he originally believed (R. 3018), but was "*exaggerated*" (Pet. p. 41).[6] On the *District Court's figures*, that "exaggeration" was at least $132,000.

Whether the precise amount of the "exaggeration" be $250,000, $132,000 or $100,000 is beside the point for we are not now determining guilt or innocence or balancing an account. What is important is that the new record, before sentencing, indisputably demonstrated that testimony vouched by the United States to the jury as true, and which the trial court found the jury believed to have been true (Pet. 29, R. 3073), was in fact seriously untruthful on a vital issue.

The Brief in Opposition (Note 11) would excuse Lubben's doctored records with the observation that *defendants* in 1953 had so contended to the jury and the jury (which

6. The learned District Court's use of the word "exaggerated" rather than "mistaken" in his 1958 re-evaluation of Lubben's testimony is important. "Exaggerate" means:

> "to enlarge beyond the bounds or the truth; to delineate extravagantly; to overstate the truth concerning."

As an intransitive verb it means:

> "to misrepresent on the side of greater size, extent, value, etc.; to oversfate the truth." (*Webster's New International Dictionary*, 2nd Edition, Unabridged.)

We believe Judge Nordbye should have used the less delicate term "perjury".

did not have the benefit of the new evidence) "disregarded" the contention. The jury "disregarded" it because in 1953 the United States strenuously assured it the records were "honest." But in 1958 Government witnesses, vouched for by it, agreed the records were doctored and that the doctoring was done by one Tobias. Although the prosecutors knew where Tobias was in New York at the time of the 1958 hearing, they did not call him to deny the doctoring.[7]

The United States vouched to the 1953 jury, *inter alia*:

> "I will tell you who David Lubben is. He is an honest, honorable American citizen. * * * Dave Lubben is telling the truth." (R. 2937.)
>
> "What you have seen are the [Lubben] records which were kept by competent, honest people * * *." (R. 2879.)

Thus the Government in 1953 unfortunately vouched for a monumental liar and for false records.

We submit it was the duty of the Department when the 1958 hearings showed that petitioners had been convicted by seriously untruthful testimony, and upon the strength of doctored records, itself to have moved for a new trial so that a new jury might pass upon the guilt or innocence of the defendants unaffected by this tainted evidence.

The Department seeks to hang onto convictions based on tainted evidence by quoting a finding of Judge Nordbye to the effect that Huebner's testimony on the new hearing was "reasonably consistent" with that given by Lubben at the jury trial, and that in any event the evidence was clear that substantial sums were paid to Shotwell and that the greater part of this was appropriated by Cain, Huebner and Sullivan. There are two ready replies:

(1) It is true that Huebner's testimony as to the *modus operandi* between himself and Lubben was "reason-

7. See Lubben's penchant for perjury displayed elsewhere (Pet. p. 30, note 11).

ably consistent" with that of Lubben, but it is obvious that Lubben's testimony, which exaggerated the gross receipts to the jury by at least $132,000, cannot be characterized as remotely consistent with the truth.

(2) Judge Nordbye's views as to whether any part of whatever sums may have been involved were received by Cain or Sullivan are wholly outside of the issues remanded to him. (His conclusion is not backed by one piece of objective evidence.)

Whatever may be said of this strange case, civilized standards of procedure and evidence, and the dignity of the United States Government forbid the conviction and imprisonment of citizens on testimony as tainted as that shown at bar.

4.

It is respectfully submitted that the problem with respect to the juries which indicted and convicted petitioners is simple.

The Brief in Opposition cannot, and does not, dispute the facts, nor distinguish or explain away any of the cases set forth in the Petition at pages 19-20 and 32-35.

The gross illegality of Commissioner Crooks' delegation of his functions to a private person is so patent that the Brief in Opposition makes no pretense at defense of it. The effect of this illegal delegation was that half the names in the jury wheel were those of persons illegally selected; that 13 members of the grand jury and 5 of the petit jury (excluding alternates) were illegally selected (Pet. 99-100).

Again, it is not disputed that volunteers were incompetent to serve. There were 10 on the grand jury, 1 on the petit (Pet. 99-100).

It is not denied that the Clerk of the Court had been told by this Court not to use private lists as a source of names,

and specifically not to use the Illinois League of Women Voters list, yet one full member of the petit jury and an alternate came from it, and another came from the Illinois Opera Guild (Pet. 99-100).

The showing of invalidity of these juries is so complete that none of the cases cited in the Brief in Opposition is remotely comparable. The juries were inbred, largely self-perpetuated, non-representative groups, and to boot, approximately half the members were selected by a wholly unauthorized person.

The only real argument advanced by the Brief in Opposition is that Criminal Rule 12 (b) (2) provides that a motion raising defects in the *institution of the prosecution or in the indictment* should be made before trial, and that failure to do so constitutes a waiver. There are succinct answers to this:

(1) The waiver, *if applicable at all on the facts here*, would only apply to the motion to dismiss or to quash the indictment because of the invalidity of the grand jury. It has no application to the invalidity of the petit jury.

(2) The rule provides that "* * * the Court for cause shown may grant relief from the waiver." If cause has not been shown here, it is difficult to imagine a case in which it ever can be. Where females are systematically excluded from a jury, or persons of color, a lawyer or a litigant by simple observation is at least put on notice that something may be wrong, but neither a citizen accused of crime nor his lawyer was bound to presume that the Clerk of the Court was not obeying the teaching of *Glasser* v. *U. S.*, and certainly was entitled to assume that the Jury Commissioner had not abandoned all but the ceremonial functions of his office. The presumption always is that public officials are acting properly. Petitioners moved promptly once they became aware of what had occurred. If "cause"

refers to timeliness we submit petitioners were timely. If "cause" is intended to refer to the substantiality or merit of the question raised rather than as to the time of raising it, there can be no doubt that cause has been shown.

(3) Petitioners were constitutionally entitled to a properly selected jury. "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right" (*Gouled* v. *U. S.*, 255 U. S. 298, 313). "Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." (*Hormel* v. *Helvering*, 312 U. S. 552, 557).

(4) This Court's opinion in the case at bar points out that the fair administration of criminal justice is not "a one-way street" (355 U. S. at 244). The Department of Justice made a belated motion to reopen this case and upon an invalid charge. If justice is not a one-way street, citizens accused of crime, raising points that are wholly valid, should be accorded the same right.

Because the record is so clear and because the Government makes no serious attempt to defend the juries, we suggest it would be appropriate to reverse the case upon the Petition and the Brief in Opposition. The opinion of this Court when the case was first here (355 U. S. at 245) recognized that "The course of this litigation has already been protracted." And it has been punishing and crushingly expensive. If the juries were illegal, as they indubitably were, petitioners should not be required to go through further, exhausting and expensive briefing and argument. The case should be brought to an end.[8]

8. Ending the case in this manner would, we suggest, also accomplish substantial justice. Petitioners Cain and Sullivan always have protested their innocence and went on the stand before the jury in an endeavor to prove it. They were overcome by perjurer Lubben and his doctored records. Huebner, an original defendant, did not take the stand. Subsequent events have proved that unknown to the higher officials of the corporation Huebner siphoned some money into his own pocket, and, regardless of what he was charged with, was actually guilty of personal tax evasion. In any event, he has been convicted and sentenced.

The question has importance far beyond this case, for the federal government yearly is moving into new and perplexing fields. It is important that jury selection officials be made to understand they must exercise their duties faithfully and in accordance with the rulings of this Court.

(We think other points are quite clear but recognize that Government offers opposition to them and therefore offer this motion on question No. 4 only.)

5.

The recapitulation statements which we assert should have been suppressed were in any event not received as against Sullivan (R. 1873, 1881, 1889, 1938) yet they were specifically described in an instruction and the jury told they could be considered against Sullivan (R. 2969). Specific objection *was* made and overruled (R. 2985). A general instruction that the jury should not consider evidence not admitted against a particular defendant will not cure a specific instruction which permits it to be considered because it cannot be told which instruction the jury followed. *Price v. U. S.* (5 Cir.), 200 F. 2d 652, 655. It is especially damaging to allow crucially important evidence to be considered against one as to whom it was not admissible. *Blumenthal v. U. S.*, 332 U. S. 539, 559; *Kotteakos v. U. S.*, 328 U. S. 750, 777.

MOTION TO REVERSE.

Petitioners move that the judgment of the Court of Appeals herein be reversed upon the Petition and Brief in Opposition and the cause remanded to the District Court with directions to dismiss the indictment because returned by an illegally composed jury, or, in the alternative, to award Petitioners a new trial because the original trial was held before an illegally composed petit jury.

CONCLUSION.

It is respectfully submitted that if this cause not be reversed upon the Petition and Brief in Opposition that the writ of certiorari issue. The case as it now stands is offensive to traditional principles of justice.

Respectfully submitted,

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